Legislative Activity and Inactivity in the COVID Pandemic in Spain

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The Spanish legal world is very divided on the normative instruments that political institutions use to restrict fundamental rights against COVID-19. The most notorious case has been the Constitutional Court's judgment of 14 July (ECLI:ES:TC:2021:148) declaring that the confinement during the first *estado de alarma* (state of emergency) from March to June suspended the rights of movement, residence, and assembly, not restricted them. This decision was adopted by the narrow margin of six to five, a ratio which mirrors the divided views of experts (in my case, I was with the Constitutional Court minority).

The second *estado de alarma*, which lasted from 25 October 2020 to 9 May 2021, is equally controversial. However, that here, I believe that seven out of ten of us jurists considered the six-month deadline unconstitutional. In its judgment of 27 October, the Constitutional Court declared it unconstitutional by seven votes to four because „it was carried out in a manner entirely inconsistent with the constitutional meaning of the act of authorisation and without any coherence whatsoever with the reasons that the Government put forward to urge the extension finally granted. Furthermore, the extension was authorised when the measures limiting rights included in the request were not going to be applied immediately by the Government, as their implementation was subject to the decision of the presidents of the Autonomous Communities so that the authorisation was given without knowing what measures were going to be applied to combat the pandemic".

There are more topics on which the legal world is hardly able to find common ground anymore: the suspension of elections (admitted in Galicia and the Basque Country, but denied in Catalonia); the prohibition of demonstrations during the state of alarm (ratified in Galicia, not in Aragon), compulsory vaccination, co-governance, the requirement of the COVID certificate to access public premises, etc. Not to mention the regional curfews, which some higher courts have been denying and others confirming, now with the general support (surprising to me) of the Supreme Court.

Jurists divided

The divisions of opinion within professional expert groups are nothing new, even more so in this heterogeneous group of jurists and even more so in this case of the state of emergency which has been so controversial among Spanish political parties in terms of content. But, even if we discount the *organic jurists*, whose doctrinal opinion is built on preconceived opinions of their political group, the truth is that the differences remain, plunging into melancholy all those of us who strive to disprove Julius von Kirchmann and his devastating „*Die Wertlosigkeit der Jurisprudenz als Wissenschaft*" (The worthlessness of jurisprudence as a science).

Of course, if we think twice, perhaps the nineteenth-century jurist gives us a clue to understanding our divisions and failures: his main criticism of legal science did not lie in interpretative techniques but the contingency and variation of its object of study, legislation. This continuous change in Italy has been called the "*maledizione di Kirchmann*" (Kirchmann's curse). It has been on display most spectacularly in Spain so far in this pandemic: at the end of last October, the central and regional governments had issued no less than 187 decree laws with the word COVID-19 in their title, to which we must add 23 laws (a difference in number that, by the way, demonstrates the *blurred parliamentarism* that prevails in Spain). There is practically no regulatory sector that has not seen its regulation changed „to mitigate the effects of COVID-19": there have been changes in agriculture, science, sports, economics, business, labour, social, tax, transport, housing, the justice administration, social security … And these are only the titles of the regulations, not the explanatory memoranda, as there are few regulations with the status of law in this year and a half of the epidemic whose existence is not justified by the COVID-19. Even the odd bill does, such as the very controversial government proposal to amend the National Security Act of 2015 because „the experience of the health crisis caused by the COVID-19 pandemic, has highlighted the need to comply with that regulatory mandate [of the third final provision of the National Security Act] in order to complete the legal regime for the contribution of resources to national security".

Solid since the 80s: the Organic Laws

All the normative sectors? Not all, because – as in Asterix the Gaul – there is one that still resists the legislator: not a single substantive regulation has been adopted that modifies the regime of fundamental rights in the event of a pandemic. The two significant laws on the subject remain as they were passed at the time: Organic Law 4/1981, on States of Alarm, Exception and Siege, and Organic Law 3/1986 on Special Measures in the Field of Public Health.

Because of this inactivity of the legislator (whose first duty of responsibility lies with the Government, to which the Constitution grants the political direction of the State), the debates I pointed out in the first paragraph are still in the doctrinal and judicial sphere and not where they should be, resolved by the legislator: we are still without a law determining when elections can be suspended, what is the deadline for extending the state of alarm, when a town can be closed perimetrically, and so on. On the contrary, forced interpretations of legislation have been made to take measures against the pandemic, many of which were widely shared (such as co-governance, curfews without alarm, etc.). In this, we have operated in the opposite way to our neighbours, with whom we like to compare ourselves so much: indeed, Germany, France, and Italy have not declared a state of emergency, but it is also true that they have modified their epidemic legislation to give new powers to the health authorities.

In Spain, against logic and statistics, our public authorities have considered that the organic laws of 1981 and 1986 were sufficient for this purpose. However, they were clearly not designed for a pandemic unprecedented since 1918. The sensible thing to do would have been to amend these laws, taking inspiration from

foreign legislation or the excellent Law 3/2020 of the Autonomous Community of Aragon, which establishes the legal regime for health alerts (although it is doubtful that an Autonomous Community has the power to adopt some of its mandates). Unfortunately, the Government has not wanted this to be done, resulting in the rule of law being undermined, especially the principles of legality and legal certainty. Moreover, with no benefit for the future: if in the coming years a new pandemic as deadly as COVID-19 were to attack us, we would have to, on the one hand, use our imagination in the interpretation of the organic laws of 1981 and 1986 and, on the other hand, go back to amending 200 ordinary laws. *Kirchmann's curse* squared.

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